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10 UNITED STATES DISTRICT COURT

11 DISTRICT OF NEVADA

12 UNITED STATES OF AMERICA,)
13 Plaintiff,)
14 v.) 2:13-CV-947-JCM-(CWH)
15 \$1,002,327.00 IN UNITED STATES)
CURRENCY seized from Fidelity Investment)
16 Account No. xxxxx9730;)
17 \$46,173.56 IN UNITED STATES)
CURRENCY seized from Bank of America)
18 Account No. xxxxxxxx3971;)
19 \$39,451.60 IN UNITED STATES)
CURRENCY seized from Gulf Coast)
20 Community Bank Account No. xxxxxxxx4690;)
21 2012 Ford F-250 Truck, VIN:)
1FT7W2BT1CEC44330; and)
22 2011 Chevrolet 3500 Express Van,)
VIN: 1GB3G3CG9B1113885,)
23)
24 Defendant.)

25 **EX PARTE MOTION FOR AN ORDER TO SEAL AND TO STAY THE CIVIL ACTION AND
ORDER**

26

The United States of America, by and through Daniel G. Bogden, United States Attorney for the District of Nevada, and Michael A. Humphreys, Assistant United States Attorney, respectfully moves this Court for an Order to seal and to stay this above-captioned civil forfeiture in rem action. The grounds for sealing and staying this civil action are to protect the ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, and the undercover law enforcement officer, and to prevent civil discovery in this case at this time which would adversely affect the ability of the United States to conduct the related grand jury investigation and criminal investigation.

This Motion is made and is based on the attached Points and Authorities.

Dated this 6th day of June, 2013.

Respectfully submitted,

DANIEL G. BOGDEN
United States Attorney

/s/ Michael A. Humphreys
MICHAEL A. HUMPHREYS
Assistant United States Attorney

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a civil forfeiture action brought by the United States against the defendants for violations of Title II of the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* The defendants are subject to civil forfeiture under 21 U.S.C. §§ 881(a)(6) and 18 U.S.C. § 981(a)(1)(A).

The facts for forfeiture under 21 U.S.C. §§ 881(a)(6) and 18 U.S.C. § 981(a)(1)(A) are set forth in the verified complaint. They show the defendants are proceeds of crimes.

8 Contemporaneously with this Ex Parte Motion, the United States is filing its Order for
9 Summons and Warrant the civil forfeiture action has already been initiated. The United States
10 requests this Court to enter an Order for Summons and Warrant of Arrest In Rem for the Property and
11 Notice and issue the Summons and Warrants of Arrest In Rem for the Property to arrest the
12 defendants to give this Court in rem jurisdiction of this case while the Ex Parte Motion, the Complaint,
13 the Order, and the Summons and Warrants become sealed and remain sealed, and the case is stayed.

14 The United States will execute the Complaint, the Order, the Summons and Warrants, and
15 the Notice on the defendants to give the Court in rem jurisdiction of this case. However, no further
16 action as required by the Order will be taken to avoid adversely affecting the ongoing grand jury
17 investigation, the grand jury information, the ongoing criminal investigation, and the undercover law
18 enforcement officer, until the ongoing criminal investigation and the grand jury investigation are
19 completed.

20 The ongoing grand jury investigation, the grand jury information, the ongoing criminal
21 investigation, the undercover law enforcement officer, and the cooperating informants should not be
22 compromised by this civil case. Accordingly, this Ex Parte Motion, the Complaint, the Order, and the
23 Summons and Warrants should be sealed, and this civil action should be stayed.

24

25

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1 **II. ARGUMENT**

2 **A. This Court Should Seal This Civil Forfeiture Case.**

3 The information in this Ex Parte Motion, the civil forfeiture complaint, the Order, and the
4 Summonses and Warrants must not be made available at this time to avoid adversely affecting the
5 ongoing grand jury investigation, the grand jury information, the ongoing criminal investigation, the
6 telephone wire tap information, the consensual monitoring information, the undercover law
7 enforcement officer, and the cooperating informants. This sealing will not prevent law enforcement
8 officer from executing the Summonses and Warrants on the defendants.

9 The Ninth Circuit Court of Appeals stated, “The district court has the inherent power to seal
10 affidavits filed with the court in appropriate circumstances...The government contends that the
11 materials should be sealed to protect the informant and to keep confidential the ongoing investigations.
12 We find...the district court did not abuse its discretion.” *United States v. Mann*, 829 F.2d 849, 853
13 (9th Cir. 1987) (citations omitted); *Offices of Lakeside Non-Ferrous Metals, Inc. v. United States*, 679
14 F.2d 778, 779 (9th Cir. 1982) (“The district court has inherent powers to seal affidavits filed with the
15 court in appropriate circumstances.”) (citation omitted); *In Re Sealed Affidavit(s) to Search Warrants
16 Executed on February 14, 1979*, 600 F.2d 1256, 1257 (9th Cir. 1979) (“[T]he courts have inherent
17 power, as an incident of their constitutional function, to control papers filed with the courts within
18 certain constitutional and other limitations.”) (citations omitted).

19 The Ninth Circuit applies a balancing test in which the United States’ necessity for secret
20 proceedings or sealed documents are weighed against the public’s interests that are affected by the
21 court’s action. *Times Mirror Company v. United States*, 873 F.2d 1210, 1213-1216 (9th Cir. 1989);
22 *Offices of Lakeside Non-Ferrous Metals, Inc.*, 679 F.2d at 779 (The courts use a balancing test.).

23 Because of CAFRA and in spite of the ongoing grand jury investigation, the grand jury
24 information, the ongoing criminal investigation, the telephone wire tap information, the consensual
25 monitoring information, the undercover law enforcement officer, and the cooperating informants, the
26 ...

1 United States has one option at this time: to bring a civil forfeiture action, to seal the case, and to stay
2 the civil action.

3 Therefore, because this Ex Parte Motion, the complaint, the Order, and the Summons and
4 Warrants contain information concerning the ongoing grand jury investigation, the grand jury
5 information, the ongoing criminal investigation, the telephone wire tap information, the consensual
6 monitoring information, the undercover law enforcement officer, and the cooperating informants, this
7 Court should seal this case.

8 **B. This Court Should Stay This Civil Forfeiture Proceeding Because Civil Discovery Will
9 Adversely Affect The Ability Of The United States To Prosecute The Related Criminal Case
And Will Disclose The Information Relating To The Confidential Witness.**

10 Congress has specifically provided that upon motion of the United States, “the court shall stay
11 the civil forfeiture proceeding if the court determines that civil discovery will adversely affect the
12 ability of the Government to conduct a related criminal investigation or the prosecution of a related
13 criminal case.” 18 U.S.C. § 981(g)(1) (emphasis added).

14 In this subsection, the terms “related criminal case” and “related criminal investigation”
15 mean an actual prosecution or investigation in progress at the time at which the request
16 for the stay, or any subsequent motion to lift the stay is made. In determining whether a
17 criminal case or investigation is “related” to a civil forfeiture proceeding, the court shall
18 consider the degree of similarity between the parties, witnesses, facts, and
circumstances involved in the two proceedings, without requiring an identity with
respect to any one or more factors.

18 U.S.C. § 981(g)(4). *See* the complaint for forfeiture in rem filed in this case.

19 The Supreme Court has expressly approved the district court’s inherent power to approve stay
20 orders such as the one at issue here.

21 [T]he power to stay proceedings is incidental to the power inherent in every court to
control the disposition of the cases on its docket with economy of time and effort for
itself, for counsel, and for litigants. How this can best be done calls for the exercise of
judgment, which must weigh competing interests and maintain an even balance.

24 Impressed with the likelihood or danger of abuse, some courts have stated broadly that,
irrespective of particular conditions, there is no power by a stay to compel an unwilling
25 litigant to wait upon the outcome of a controversy to which he is a stranger. All the

26 cases advancing it could have been adequately disposed of on the ground that discretion
was abused by a stay of indefinite duration in the absence of a pressing need. If they

1 stand for more than this, we are unwilling to accept them. We must be on our guard
2 against depriving the processes of justice of their suppleness of adaptation to varying
3 conditions. Especially in cases of extraordinary public moment, the individual may be
4 required to submit to delay not immoderate in extent and not oppressive in its
5 consequences if the public welfare or convenience will thereby be promoted.
6

7 *Landis v. North American Co.*, 299 U.S. 248, 254-56, 57 S. Ct. 163, 166 (1936) (citations omitted).

8 See also *Rohan v. Woodford*, 334 F.3d 803, 817 (9th Cir. 2003) (“District courts have inherent
9 authority to stay proceedings before them...”) (citation omitted); *Stern v. United States*, 563 F. Supp.
10 484, 489 (D. Nev. 1983) (“Every court has the inherent power to stay causes on its docket with a view
11 to avoiding duplicative litigation, inconsistent results, and waste of time and effort by itself, the
12 litigants and counsel.”) (citations omitted).

13 The Supreme Court observed the widespread practice of “[f]ederal courts...deferr[ing] civil
14 proceedings pending the completion of parallel criminal prosecutions when the interests of justice
15 seem[] to require such action, sometimes at the request of the prosecution [and s]ometimes at the
16 request of the defense.” *United States v. Kordel*, 397 U.S. 1, 12, 90 S. Ct. 763, 770, n. 27 (1970).

17 The Supreme Court has also stated that pending “criminal proceedings,” such as the ongoing
18 criminal investigation and ongoing grand jury investigation, may justify delaying the forfeiture action.

19 Pending criminal proceedings present similar justifications for delay in instituting civil
20 forfeiture proceedings. A prior judgment to contemporaneous civil proceeding could
21 substantially hamper the criminal proceedings, which – as here – may often include
22 forfeiture as part of the sentence. A prior civil suit might serve to estop later criminal
23 proceedings and may provide improper opportunities for the claimant to discover the
24 details of a contemplated or pending criminal prosecution.

25 *United States v. \$8,850*, 461 U.S. 555, 567, 103 S. Ct. 2005, 2013 (1983) (citations omitted).

26 Similarly, other courts have deferred to the public interest in law enforcement by giving
27 priority to pending criminal prosecutions over a civil litigant’s interest in the prompt adjudication of
28 his or her civil claim.

29 ...

30 ...

31 ...

1 In *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955, 83 S. Ct.
 2 502 (1963), the Fifth Circuit noted the conflicting policies and objectives underlying the rules of
 3 discovery in federal civil and criminal cases:

4 In handling motions for a stay of a civil suit until the disposition of a criminal
 5 prosecution on related matters and in ruling on motions under the civil discovery
 6 procedures, a judge should be sensitive to the difference in the rules of discovery in
 7 civil and criminal cases. While the Federal Rules of Civil Procedure have provided a
 8 well-stocked battery of discovery procedures, the rules governing criminal discovery
 9 are far more restrictive. . . . A litigant should not be allowed to make use of the liberal
 10 discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on
 11 criminal discovery and thereby obtain documents he would not otherwise be entitled to
 12 for use in his criminal suit.

13 *Campbell*, 307 F.2d at 487 (citations omitted); *Bittaker v. Woodford*, 331 F.3d 715, 734-35 (9th Cir.
 14 2003) (O'Scannlain, J., and Rawlinson, J., concurring); *Osband v. Woodford*, 290 F.3d 1036, 1042-43
 15 (9th Cir. 2002). The Court continued:

16 The very fact that there is a clear distinction between civil and criminal actions requires
 17 a Government policy determination of priority: which case should be tried first.
 18 Administrative policy gives priority to the public interests in law enforcement. This
 19 seems so necessary and wise that a trial judge should give substantial weight to it in
 20 balancing the policy against the right of a civil litigant to a reasonable prompt
 21 determination of his civil claims or liabilities.

22 *Id.* at 487 (emphasis added).

23 As Judge Bell noted in his concurring opinion, “The criminal aspect of the matters could not be
 24 ignored [because] the end result [of allowing discovery] was tantamount to allowing discovery under
 25 Federal Rules of Civil Procedure in a criminal proceeding, something we are powerless, as was the
 26 trial court, to authorize.” *Campbell*, 307 F.2d at 492-493.

27 Courts also have approved the stay of civil proceedings simply because a civil litigant has the
 28 potential to exploit civil discovery to the detriment of a related criminal investigation. In *United States
 29 v. Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976), the civil litigant had asserted his Fifth Amendment
 30 privilege against self-incrimination during the discovery process as he simultaneously sought
 31 Government production of documents which pertained to the ongoing criminal case against him. The
 32 Third Circuit upheld the stay of the civil jeopardy assessment action upon a finding that the mere

1 similarity of issues between the civil and criminal cases opened the door for the taxpayer to abuse civil
2 discovery in order to gain an advantage in his criminal case.

3 It was clearly within the power of the district court to balance competing interests and
4 decide that judicial economy would best be served by a stay of civil proceedings. The
5 court found, and Meissner [the taxpayer] does not contend otherwise, that the civil
6 matter before it and the criminal case in New York involved substantial matters of the
7 same nature. Hence, it might well have been that resolution of the criminal case would
8 moot, clarify, or otherwise affect various contentions in the civil case. Furthermore, the
9 similarity of the issues left open the possibility that Meissner might improperly exploit
10 civil discovery for the advancement of his criminal case.

11 *Mellon Bank, N.A.*, 545 F.2d at 872-873 (citations and quotes omitted).

12 In *Larouche Campaign v. F.B.I.*, 106 F.R.D. 500, 501 (1985), the court stated that the broad
13 rules of civil discovery cannot be used to circumvent the more restrictive rules of criminal discovery.
14 To protect against circumvention of discovery rules in criminal proceedings and to protect against
15 impediments to an ongoing criminal investigation, the court in *Larouche* granted a stay of civil
16 discovery. The stay order was limited in time until the Grand Jury failed to return an indictment or
17 until the conclusion of the presentation of evidence at trial in the parallel criminal proceeding. *Id.* at
18 502. *See also White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 503 (1987).

19 In its enactment of the Victim and Witness Protection Act of 1982, Congress recognized the
20 importance of protecting victims and witnesses in federal criminal cases. This legislative protection
21 was intended to prevent the intimidation and harassment of witnesses, including confidential
22 witnesses, during the criminal case process. However, the legislative committee acknowledged that
23 the Victim and Witness Protection Act could not be drafted with sufficient breadth to encompass all
24 witness intimidation and harassment situations. In *United States v. Tison*, 780 F.2d 1569 (11th Cir.
25 1986), during a pending federal criminal action, the counsel for the defendants attempted to bring a
26 state civil action to avoid the restrictions on federal criminal discovery and thereby obtain documents
and have access to witnesses that a defendant would not ordinarily be entitled to for use in the criminal
case.

1 The court in *Tison* affirmed the district court order enjoining the criminal defendants from
2 bringing a state civil action. In reaching its decision in the *Tison* case, the court disapproved of the
3 usage of “the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions
4 on criminal discovery . . .” *Id.* at 1572. The *Tison* decision also indicated that the obstruction of
5 justice statute may not be a sufficient safeguard to protect witnesses in the situation where the civil
6 discovery and criminal discovery rules come into conflict. *Id.* at 1572.

7 The enactment of 18 U.S.C. § 981(g) reflects Congressional recognition of the competing
8 interests at stake when there is a pending civil forfeiture action which is related to an ongoing criminal
9 investigation and grand jury investigation. The ongoing grand jury investigation, the grand jury
10 information, the ongoing criminal investigation, the telephone wire tap information, the consensual
11 monitoring information, the undercover law enforcement officer, and the cooperating informants
12 should not be compromised by this civil case. The statute resolves those competing interests by
13 showing deference to the superior interest in having an unfettered completion of the criminal matter
14 even though the civil case must consequently suffer a delay.

15 The United States seeks to seal and to stay this civil forfeiture proceeding to allow the
16 completion of the ongoing criminal investigation and grand jury investigation related to this civil case
17 and for the protection of the ongoing grand jury investigation, the grand jury information, the ongoing
18 criminal investigation, and the undercover law enforcement officer should not be compromised by this
19 civil case. The ongoing criminal investigation and grand jury investigation will be placed at risk
20 through the premature disclosure of the civil forfeiture action, the witnesses, and the documents which
21 would be routinely discovered in a civil action. More importantly the protection of the undercover law
22 enforcement officer and the confidential informants are imperative.

23 In both cases, the parties are the same; the witnesses are the same; the facts are the same; and
24 the circumstances are the same. To continue with the forfeiture action at this time would frustrate and
25 inhibit the orderly completion of the criminal investigation and grand jury investigation by allowing
26 . . .

1 civil discovery, which could prematurely disclose sensitive details of the criminal case. The disclosure
2 of the details of these investigations would be substantially prejudicial to the United States.

3 Lastly, the ongoing grand jury investigation, the grand jury information, the ongoing criminal
4 investigation, the telephone wire tap information, the consensual monitoring information, the
5 undercover law enforcement officer, and the cooperating informants should not be compromised by
6 this civil case.

7 **III. CONCLUSION**

8 This Court should grant the United States' motion to seal and to stay this civil forfeiture action
9 to avoid adversely affecting the ongoing criminal investigation and the ongoing grand jury
10 investigation and to protect the grand jury information, the telephone wire tap information, and the
11 confidential witnesses.

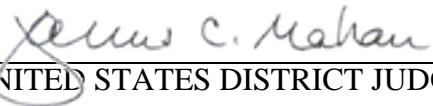
12 Dated this 6th day of June, 2012.

13 Respectfully submitted,

14 DANIEL G. BOGDEN
United States Attorney

15 /s/ Michael A. Humphreys
16 MICHAEL A. HUMPHREYS
17 Assistant United States Attorney

18
19 IT IS SO ORDERED:

20
21
22 
23 UNITED STATES DISTRICT JUDGE

24 DATED: June 25, 2013